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IN THE

Supreme Court of the United States

DAVID A. ZUBIK ET AL.,
Petitioners,

v.

SYLVIA MATHEWS BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Third, Fifth, Tenth, and D.C. Circuits

BRIEF OF AMICI CURIAE FORMER JUSTICE DEPARTMENT OFFICIALS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici are former prosecutors and officials of the U.S. Department of Justice who have a special interest in law enforcement and particularly in the enforcement policies of the Justice Department. Amici submit this brief pursuant to Supreme Court Rule 37 to explain that Petitioners' notion of moral complicity is a familiar concept in the criminal law that the Justice Department recognizes and applies in other contexts. Amici include the following individuals.[1]

John D. Ashcroft served as Attorney General of the United States from 2001 to 2005 and as Attorney General of Missouri from 1977 to 1985.

William P Barr served as Attorney General of the United States from 1991 to 1993 and as Deputy Attorney General of the United States from 1990 to 1991.

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[1] In accordance with Rule 37.6, Amici certify that no counsel for any party authored this brief in whole or in part, and no person or entity other than named Amici made a monetary contribution for the preparation and submission of this brief. Letters of consent to the filing of amicus briefs have been filed with the Clerk.

District Judge for the Southern District of New York from 1991 to 1993.

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SUMMARY OF ARGUMENT

Petitioners' claim under the Religious Freedom Restoration Act (RFRA) seeks to vindicate their right to avoid moral complicity in conduct they sincerely believe is religiously objectionable in the most fundamental terms. The appellate courts, however, dismissed Petitioners' concerns because much of the conduct will be performed by third parties. The Department of Justice also dismissed Petitioners' concerns about moral complicity, arguing that Petitioners "are fighting an invisible dragon." Yet in the context of the criminal law, the courts and the Department routinely hold persons culpable for the wrongful conduct of third parties—by imposing liability for aiding and abetting, conspiracy, and other forms of assistance.

Petitioners' religious concept of moral complicity resembles the legal concept of criminal complicity. To be criminally complicit in wrongdoing, a person need only facilitate the scheme to some (even slight) degree with knowledge of the scheme's intended result. Here, Petitioners wish to avoid facilitating, through the use of their own "coverage administration infrastructure," a coverage scheme they know will result in ends religiously offensive to them. The courts and the government should not dismiss a religious concern that so closely parallels traditional legal concepts of complicity.

In fact, the right of religious believers to avoid complicity in objectionable conduct has been a key feature of this Court's protection of rights to religious exercise—such as the believer's right to refrain from participating in the production of materials meant for war. Here, the fact that Petitioners' healthcare infrastructure consists of contractual relationships, administrative arrangements, and proprietary information rather than physical property makes its commandeering for objectionable purposes no less a substantial burden on religious exercise. Petitioners seek to avoid moral complicity where, under analogous criminal circumstances, the law could judge them culpable. RFRA affords them that right.

ARGUMENT

I. MORAL COMPLICITY IS A WELL-ESTABLISHED LEGAL PRINCIPLE.

Petitioners' claim not only invokes a fundamental right but also "implicates a difficult and important

question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2778 (2014). While the government insists that it has afforded an "accommodation," Petitioners believe that the regulations requiring them to transfer responsibility for providing contraceptives or abortifacients makes them complicit in religiously objectionable conduct.

Not only must Petitioners act to impose that responsibility, but the provision of contraceptives or abortifacients will take place through Petitioners' own "insurance coverage network" by utilizing the "coverage administration infrastructure" that Petitioners have established to provide healthcare coverage to their employees. 80 Fed. Reg. 41318, 41328 (Jul. 14, 2015). In other words, Petitioners' act of purportedly "opting out" means that the parties with whom Petitioners have contracted—insurers and third-party administrators—will employ the health coverage infrastructure Petitioners have established to provide services Petitioners regard as immoral.

At least one of the courts below acknowledged that what the government calls "opting out" is actually what authorizes the objectionable conduct. *See Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1182 (10th Cir. 2015) ("The TPA is authorized and obligated to provide the coverage guaranteed by the ACA *only if* the religious nonprofit organization that has primary responsibility for contraceptive coverage opts out of providing it.")

(emphasis added). And the government's religious-objection form provides explicitly that "[t]his form or a notice to the Secretary is an instrument under which the plan is operated." *Id.* at 1207. Thus, pursuant to the hollow "accommodation," Petitioners must execute a document that obligates their own contractors to provide contraceptives or abortifacients through their own health coverage infrastructure.[2]

Despite this way in which the regulations involve Petitioners in an overall scheme to deliver contraceptives or abortifacients, appellate courts have dismissed Petitioners' objection to being made complicit in immoral conduct on the ground that Petitioners need not directly provide contraceptives or abortifacients themselves. *See, e.g.*, *Little Sisters*, 794 F.3d at 1179 ("[U]pon receipt of the Form or a notification from the government, health insurance issuers and TPAs—not the objecting religious non-profit organization—provide contraceptive coverage."); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 459 (5th Cir. 2015) ("Although the plaintiffs have identified several acts that offend their religious beliefs, the acts *they* are required to perform do not include providing or facilitating access to contraceptives. Instead, the acts that violate their faith are those of third parties."); *Geneva Coll. v. HHS*, 778 F.3d 422, 442 (3d

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[2] Some Petitioners object to contraceptives while others, as in *Hobby Lobby*, believe that some "contraceptive methods at issue are abortifacients," 134 S. Ct. at 2759, even if federal regulations "do not so classify them," *id.* at 2763 n.7; *see also* FDA, *Birth Control Guide*, http://1.usa.gov/1RlDiPP (noting that some contraceptive methods may act "by preventing attachment (implantation) to the womb (uterus)").

Cir. 2015) ("[H]ere, where the actual provision of contraceptive coverage is by a third party, the burden is not merely attenuated at the outset but totally disconnected from the appellees."); *Priests for Life v. HHS*, 772 F.3d 229, 249 (D.C. Cir. 2014) ("Once an eligible organization has taken the simple step of objecting, all action taken to pay for or provide its employees with contraceptive services is taken by a third party.").

For its part, the government claims not even to grasp Petitioners' notion of moral complicity, suggesting that Petitioners "are fighting an invisible dragon." Defendants' Reply in Support of Their Motion to Dismiss at 1, *Little Sisters of the Poor Home for the Aged v. Sebelius*, 6 F. Supp. 3d 1225 (D. Colo. 2013) (No. 13-2611), 2013 WL 6497951.

The first answer to these courts and to the government is that "the federal courts have no business addressing []whether the religious belief asserted in a RFRA case is reasonable." *Hobby Lobby*, 134 S. Ct. at 2778. As one dissenting judge put it, "this is not a question of legal causation but of religious faith." *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 566 (7th Cir. 2014) (Flaum, J., dissenting); *see also Priests for Life v. HHS*, 808 F.3d 1, 9 (D.C. Cir. 2015) (Brown, J., dissenting from denial of rehearing en banc) ("What amounts to 'facilitating immoral conduct,' 'scandal,' and 'material' or 'impermissible cooperation with evil' are inherently theological questions.") (internal citations omitted).

But even if it were properly a legal question, the government's apparent confusion would still be perplexing because the law routinely holds persons

complicit in the wrongful conduct of third parties. In a wide range of cases, the Department of Justice does not struggle to understand and to apply theories of complicity such as aiding and abetting, conspiracy, accessory after the fact, and misprision of felony. Yet now that this familiar concept has been invoked here by religious conscientious objectors, the Department feigns ignorance.

This Court recently observed that contemporary criminal law "reflects a centuries-old view of culpability: that a person may be responsible for a crime he has not personally carried out if he helps another to complete its commission." *Rosemond v. United States*, 134 S. Ct. 1240, 1245 (2014). The prohibition on aiding and abetting "'comprehends all assistance rendered by words, acts, encouragement, support, or presence'—even if that aid relates to only one (or some) of a crime's phases." *Id.* at 1246-47 (quoting *Reves v. Ernst & Young*, 507 U.S. 170, 178 (1993)) (internal citation omitted). It is therefore "inconsequential" that a person's "acts did not advance each element of the offense; all that matters is that they facilitated one component." *Id.* at 1247.

The Department of Justice's own *Criminal Resource Manual* explains that a defendant's "level of facilitation may be of relatively slight moment" and that "it does not take much evidence to satisfy the facilitation element once the defendant's knowledge of the unlawful purpose is established." U.S. Dep't of Justice, *Criminal Resource Manual* § 2474 (1998); *see also United States v. Leos-Quijada*, 107 F.3d 786, 794 (10th Cir. 1997) ("[T]he level of participation may be of 'relatively slight moment.'"); *United States*

v. Bennett, 75 F.3d 40, 45 (1st Cir. 1996) ("[O]nce knowledge on the part of the aider and abettor is established, it does not take much to satisfy the facilitation element.").

A defendant may be liable as an aider and abettor where he "provided his car" for a crime or "provided a house for meeting" to plan it. *Id.* Accomplice liability may also be established by conduct such as "act[ing] as a lookout," "man[ning] the getaway car," or "signal[ing] the approach of the victim." Wayne R. LaFave, *Criminal Law* 672-73 (4th ed. 2003).

While the facilitation may be relatively slight, the mental state required is "knowledge," as the *Criminal Resource Manual* also notes. In the context of material support for terrorism, this Court has observed that a defendant need only have "knowledge about the organization's connection to terrorism, not specific intent to further its terrorist activities," to be criminally culpable. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 2 (2010); *see also* 18 U.S.C. § 2339A(a) (proscribing the provision of material support "knowing" of its intended use).

Similarly, this Court upheld a conviction for aiding and abetting the evasion of liquor taxes where a defendant "knows" he is aiding a "secret distillery" because "a well known object of an illicit distillery" is "to violate Government revenue laws." *Bozza v. United States*, 330 U.S. 160, 165 (1947). Several courts of appeals have held "that the unarmed driver of a getaway car had the requisite intent to aid and abet armed bank robbery if he 'knew' that his confederates would use weapons in carrying out the crime." *Rosemond*, 134 S. Ct. at 1249 (citing *United*

States v. Akiti, 701 F.3d 883, 887 (8th Cir. 2012); *United States v. Easter*, 66 F.3d 1018, 1024 (9th Cir. 1995)). And this Court found the requisite intent for aiding and abetting mail fraud when a defendant "does an act with knowledge that the use of the mails will follow in the ordinary course of business." *Pereira v. United States*, 347 U.S. 1, 8-9 (1954).

As this Court has explained, when a person facilitates "a criminal scheme knowing its extent and character," he "becomes responsible, in the typical way of aiders and abettors, for the conduct of others." *Rosemond*, 134 S. Ct. at 1249.

This Court has clarified that such knowledge "must be advance knowledge—or otherwise said, knowledge that enables him to make the relevant legal (*and indeed, moral*) choice." *Id.* (emphasis added). That is the very point Petitioners make—not that they are at risk of criminal complicity but of the analogous moral complicity. *Cf. Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 614 (7th Cir. 2015) ("[T]he Catholic concept of 'scandal' forbids the encouragement (equivalent to aiding and abetting) of sinful acts."). They too are faced with a moral choice.

Petitioners have advance knowledge that the regulatory scheme in which they must participate will result in conduct that, to them, is deeply immoral. And by taking an action that will obligate and enable their healthcare contractors and health coverage infrastructure to provide contraceptives or abortifacients, they facilitate that conduct—even if, as the government wants to suggest, the "level of facilitation may be of relatively slight moment." Peti-

tioners facilitate that conduct not only by allowing the use of their health coverage infrastructure but even by establishing that infrastructure in the first place.[3] If an individual becomes criminally complicit by providing a car or a meeting place knowing the purpose for which it will be used, then Petitioners' argument that the regulatory arrangement makes them morally complicit should be recognizable to the courts and to the lawyers at the Department of Justice.

Given well-established notions of criminal complicity, Petitioners' claim of moral complicity rests on commonplace legal concepts. *But see Little Sisters*, 794 F.3d at 1171 ("[W]e wish to highlight the unusual nature of Plaintiffs' central claim."). Indeed, without extending the analogy too far, the criminal law may also be instructive for particular aspects of Petitioners' claim.

For example, appellate courts have rejected Petitioners' claim on the ground that contraceptives would ultimately be provided *anyway* because federal law requires it. *See, e.g.*, *Geneva Coll.*, 778 F.3d at 437 ("[T]he self-certification form does not trigger or facilitate the provision of contraceptive coverage because coverage is mandated to be otherwise provided by federal law."); *Priests for Life*, 772 F.3d at 253 ("[C]ontraceptive services are not provided to women

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[3] *But see Hobby Lobby*, 134 S. Ct. at 2777 ("We doubt that the Congress that enacted RFRA ... would have believed it a tolerable result to put family-run businesses to the choice of violating their sincerely held religious beliefs or making all of their employees lose their existing healthcare plans.").

because of Plaintiffs' contracts with insurance companies; they are provided because federal law requires insurers and TPAs to provide insurance beneficiaries with coverage for contraception."); *Notre Dame*, 743 F.3d at 559 ("Because Congress has imposed an independent obligation on insurers to provide contraceptive coverage to Appellants' employees, those employees will receive contraceptive coverage from their insurers *even if* Appellants self-certify—but not *because* Appellants self-certify.").

Criminal complicity, however, does not require that sort of but-for causation:

> The assistance given ... need not contribute to the criminal result in the sense that but for it the result would not have ensued. It is quite sufficient if it facilitated a result that would have transpired without it. It is quite enough if the aid merely rendered it easier for the principal actor to accomplish the end intended by him ... though in all human probability the end would have been attained without it.

State v. Tally, 15 So. 722, 738-39 (Ala. 1894), *quoted in* LaFave, *supra*, at 674. Here, it is not essential to Petitioners' claim that their actions be a necessary cause of the provision of contraceptives or abortifacients. It is enough that Petitioners are made to facilitate that (perhaps inevitable) result. When the Department of Health and Human Services adopted the current "accommodation" scheme, it did so *precisely* because it was easier to provide contraceptive coverage within the existing "insurance coverage network" and "coverage administration infrastructure" rather than by other means. 80 Fed. Reg. at

41328. It is no answer to Petitioners' objection to facilitating coverage that coverage would be provided *anyway* through some other mechanism because of the overall legal mandate.

Appellate courts have also suggested that Petitioners are not morally complicit because they may express their opposition to the goal of providing contraceptive or abortion services. *See, e.g.*, *Geneva Coll.*, 778 F.3d at 438-39 ("[B]ecause the appellees specifically state on the self-certification form that they *object* on religious grounds to providing such coverage, it is a declaration that they will *not be complicit* in providing coverage."); *Priests for Life*, 772 F.3d at 237 ("[T]hey remain free to condemn contraception in the clearest terms."). Yet criminal complicity does not require that the accomplice identify with the goals of the principal:

> But what if he merely rendered assistance, without being compensated or otherwise identifying with the goals of the principal? We do not think it should make a difference, provided the assistance is deliberate and material. One who, knowing the criminal nature of another's act, deliberately renders what he knows to be active aid in the carrying out of the act is, we think, an aider and abettor even if there is no evidence that he wants the act to succeed—even if he is acting in a spirit of mischief. The law rarely has regard for underlying motives. ... [I]t has always been enough that the defendant, knowing what the principal was trying to do, rendered assistance that he believed would (whether or not he cared that it would) make the principal's success more likely.

United States v. Ortega, 44 F.3d 505, 508 (7th Cir. 1995). Surely, if a defendant knowingly drove a getaway car, but did so only to avoid financial sanctions,[4] he would be an accomplice even if he personally wished the caper would not succeed.

Appellate courts have said that by outsourcing the responsibility for providing contraceptives or abortifacients to their "insurance issuer or third-party administrator," Petitioners avoid complicity in that conduct. *Geneva Coll.*, 778 F.3d at 427. Yet in the context of tax liability, for example, "a company can be a 'manufacturer' of property even though it does not itself manufacture the property" when it "contracts with third parties to manufacture its products." *Suzy's Zoo v. CIR*, 273 F.3d 875, 879 (9th Cir. 2001); *see also Charles Peckat Mfg. Co. v. Jarecki*, 196 F.2d 849, 851 (7th Cir. 1952) ("[I]t is not unusual in taxing statutes for the term 'manufacturer' to include one who has contracted with others to actually fabricate the product."). Liability attaches to the principal, and it cannot be avoided when the principal outsources manufacturing to a contractor.

Here, Petitioners object to rendering assistance through their contractors that they know will facilitate conduct they regard as immoral and religiously offensive. Like the potential accomplice, they face a "legal (and indeed, moral) choice," *Rosemond*, 134 S. Ct. at 1249, either to violate sincere religious belief by becoming complicit in conduct they find deep-

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[4] *See, e.g., Little Sisters*, 794 F.3d at 1167 ("If they do not take one of these steps and do not provide contraceptive coverage, they estimate a single Little Sisters home could incur penalties of up to $2.5 million per year.").

ly immoral or to submit to substantial fines. In arguing the law cannot force that choice upon them, Petitioners invoke a conception of moral complicity that has deep roots in our legal tradition. It is a claim the law should recognize.

II. AVOIDING MORAL COMPLICITY IS AN ESSENTIAL PART OF THE RIGHT TO RELIGIOUS EXERCISE.

Petitioners' claim seeking to avoid moral complicity is consistent not only with legal concepts of culpability but also with the law governing the right to religious exercise. The right to avoid complicity in objectionable conduct is an essential component of religious liberty. The appellate courts that have considered Petitioners' moral-complicity claims, however, have conflated the right of religious exercise with the right to free expression. *See, e.g.*, *Little Sisters*, 794 F.3d at 1185 n.36 ("The government is not compelling the plaintiffs to endorse or license something they consider objectionable."); *Priests for Life*, 772 F.3d at 250 ("The regulations leave eligible organizations free to express to their employees their opposition to contraceptive coverage."); *E. Tex. Baptist*, 793 F.3d at 461 ("[T]he plaintiffs are excluding contraceptive coverage from their plans and expressing their disapproval of it."); *Geneva Coll.*, 778 F.3d at 439 n.14 (discussing hypothetical example in which "John Doe, like the appellees, is able to *express* his religious objection" and thereby indicates "that he will *not* be complicit").

Yet the question is not simply what message Petitioners are communicating but whether they are complicit in immoral conduct. It is not a question of

communicative impact but of actual facilitation. Appellate courts missed this point by holding that Petitioners cannot be considered complicit "because the appellees specifically state on the self-certification form that they *object* on religious grounds to providing such coverage." *Id.* at 438-39; *see also Little Sisters*, 794 F.3d at 1191 ("Opting out sends the unambiguous message that they *oppose* contraceptive coverage and refuse to provide it, and does not foreclose them from objecting both to contraception and the Mandate in the strongest possible terms.").

Religious exercise entails more than outward speech. "[T]he 'exercise of religion' involves 'not only belief and profession but the performance of (or abstention from) physical acts' that are 'engaged in for religious reasons.'" *Hobby Lobby*, 134 S. Ct. at 2770 (quoting *Emp't Div. v. Smith*, 494 U.S. 872, 877 (1990)). The religious believer retains the right to act in accordance with religious principles and thereby "to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community." *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring); *see also Watson v. Jones*, 80 U.S. 679, 728 (1871) ("In this country the full and free right to entertain any religious belief, *to practice any religious principle*, and to teach any religious doctrine ... is conceded to all.") (emphasis added).

In this case, Petitioners are not primarily concerned with the ability to state an objection to contraception or abortion. Rather, Petitioners wish to conduct themselves in accordance with divine commands—that is, to live in accordance with their "own

concept of existence, of meaning, of the universe, and of the mystery of human life." *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992). RFRA protects that right.

RFRA "was designed to provide very broad protection for religious liberty," going "far beyond what this Court has held is constitutionally required." *Hobby Lobby*, 134 S. Ct. at 2767. The statute provides that the government "shall not substantially burden a person's exercise of religion" unless it satisfies a least-restrictive-means test. 42 U.S.C. § 2000bb-1. And it defines "exercise of religion" broadly to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7); *see also* 42 U.S.C. § 2000bb-2(4) (defining "exercise of religion" by reference to § 2000cc-5(7)).

This protection plainly encompasses Petitioners' claim to avoid engaging in conduct they believe would make them complicit in wrongdoing. This Court's cases demonstrate that the protection for religious exercise extends beyond the right to express a viewpoint concerning objectionable conduct; it includes the right to perform (or abstain from) physical acts.

In *Holt v. Hobbs*, 135 S. Ct. 853 (2015), for example, this Court sustained the right of a Muslim prison inmate to refrain from shaving his beard, as required by his religious beliefs, under the Religious Land Use and Institutionalized Persons Act.[5] The

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[5] RLUIPA "allows prisoners 'to seek religious accommodations pursuant to the same standard as set forth in RFRA.'"

Court rejected the arguments that the prison's shaving requirement was not a substantial burden because the prisoner had "alternative means of practicing religion" and because "his religion would 'credit' him for attempting to follow his religious beliefs, even if that attempt proved to be unsuccessful." *Id.* at 862. In this way, the Court held that the religious prisoner's ability to *express his opposition* to shaving his beard (by attempting to avoid doing so) did nothing to relieve the substantial burden on his religious exercise. That exercise included his avoidance of morally objectionable conduct, not merely the possibility that he would be seen to endorse such conduct.

In *Thomas v. Review Bd.*, 450 U.S. 707 (1981), this Court sustained the claim of a Jehovah's Witness who "claimed his religious beliefs prevented him from participating in the production of war materials." *Id.* at 709. It would have been no solace for the claimant—and no answer to this Court—if he had simply been allowed to express his opposition to war while doing so. The right to religious exercise allowed him to avoid becoming complicit in conduct he found religiously objectionable.

The same can be said for the Seventh-day Adventist in *Sherbert v. Verner*, 374 U.S. 398 (1963), whose religious beliefs required her actually to avoid work on the Sabbath rather than merely to express her opposition to such work. Or for the Amish parents who believed "that their children's attendance at high school, public or private, was contrary to the

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Holt, 135 S. Ct. at 860 (quoting *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 436 (2006)).

Amish religion and way of life." *Wisconsin v. Yoder*, 406 U.S. 205, 209 (1972). Or for Muslim or Jewish inmates who want to avoid eating non-halal or non-kosher food. *See, e.g.*, *Moussazadeh v. Tex. Dep't of Criminal Justice*, 703 F.3d 781, 785 (5th Cir. 2012); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1306 (10th Cir. 2010); *United States v. Sec'y, Fla. Dep't of Corr.*, No. 12-22958, 2015 WL 1977795, at *11 (S.D. Fla. Apr. 30, 2015). In these cases, the protected right was to avoid engaging in or becoming complicit in religiously objectionable conduct, not merely to object publicly to such conduct.

Like the potential accomplice who must make "the relevant legal (and indeed, moral) choice," *Rosemond*, 134 S. Ct. at 1249, religious believers wish to make the moral choices relevant to themselves. They do not seek merely to advocate their religious principles but to conduct themselves in accordance with those principles.

For this reason, courts are wrong to insist that the problem of moral complicity can be cured simply by communicating that Petitioners do not support contraceptive coverage. *See, e.g.*, *Priests for Life*, 772 F.3d at 250 (noting that regulations "require that the insurer or TPA specify to the beneficiaries in those separate mailings that their employer is in no way 'administer[ing] or fund[ing]' the contraceptive coverage"). Petitioners are concerned not only with the appearance of endorsement but with actual complicity.

The government might suggest, as it did in *Hobby Lobby*, that the connection between Petitioners and the objectionable conduct in this case "is simply too

attenuated," 134 S. Ct. at 2777, because Petitioners must simply see their "coverage administration infrastructure" used by third parties for the provision of contraceptive and abortion services. But it is not difficult to imagine the equivalent connection in a more traditional context—if a synagogue's event space, for example, were commandeered for a pig roast, even though no congregants had to participate. Or an Islamic Community Center were compelled to display a third party's artwork depicting the Prophet Muhammad, though community members did not need to attend the exhibit.

Or what if the owners of Hobby Lobby were required to open their stores on Sunday, even though they personally did not need to work on Sunday? Or were required to allow third parties to sell alcohol through their stores? *But see Hobby Lobby*, 134 S. Ct. at 2766 ("In accordance with [religious] commitments, Hobby Lobby and Mardel stores close on Sundays .... The businesses refuse to engage in profitable transactions that facilitate or promote alcohol use.").

In such cases, third parties would be performing the objectionable conduct only by making use of the religious believers' infrastructure. Yet that does not eliminate the substantial burden on religious exercise. Here, Petitioners must allow their private infrastructure to be the vehicle for religiously offensive conduct—or suffer a penalty. That commandeering of private property is impermissible because it makes the owner complicit in religiously offensive conduct.

This Court has recognized that the person is not entirely separable from his property (or "infrastructure").[6] As Professor Margaret Jane Radin observed, "[T]o achieve proper self-development—to be a person—an individual needs some control over resources in the external environment. The necessary assurances of control take the form of property rights."[7] For that reason, this Court has said that religious organizations must retain control over how they operate and conduct their internal affairs. The Court has long recognized that the guarantee of religious exercise requires "a spirit of freedom for religious organizations, an independence from secular control or manipulation." *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952). Over a century ago, this Court described as "unquestioned" the right "to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine" and "for the ecclesiastical government of all the individual members, congregations, and officers within the general association." *Watson*, 80 U.S. at 728-29.

Here, the substantial burden on Petitioners is not limited to coercing their cooperation in the scheme at issue (which they believe makes them complicit in

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[6] Thus, this Court has said that the government may not commandeer an individual's private property to spread its own ideological message. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (invalidating statute that "in effect requires that appellees use their private property as a 'mobile billboard' for the State's ideological message or suffer a penalty").

[7] Margaret Jane Radin, *Property and Personhood*, 34 Stan. L. Rev. 957, 957 (1982).

serious evil) but also includes preventing them from organizing and operating their ministry in a way that accords with their beliefs about human life, the dignity and meaning of procreation, and human flourishing that are at the core of their religious faith.

If religious organizations are to achieve "self-definition in the political, civic, and economic life of our larger community," *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring), they must remain free to organize their affairs in accordance with religious principle. By compelling religious organizations to alter their relations with employees so as to become complicit in what they sincerely view as sinful conduct, the government both violates that guarantee and demonstrates why it is needed.

CONCLUSION

For the foregoing reasons, the judgments of the Courts of Appeals should be reversed.

Respectfully submitted,

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